APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-424

In the Matter of the Application

of

THE BOARD OF REGENTS of The University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1979
CERTIORARI GRANTED NOVEMBER 5, 1979

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SUPREME COURT-APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

In the Matter of MARY TOMANIO, Respondent,
v.
BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et al., Appellants.

In the Matter of Mary Tomanio, Respondent, v. Board of Regents of the University of the State of New York et al., Appellants. - Appeal from a judgment of the Supreme Court, Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, seeking to direct the Board of Regents to issue her a license to practice chiropractic in New York State. The petitioner has been practicing chiropractic in this State since 1958. In 1963, by chapter 780 of the Laws of 1963, this State adopted its first chiropractic licensing law and section 6556 of the Education Law became applicable to those who, like the petitioner, were then practicing in the State. In 1971, acting upon the recommendation of the Joint Legislative Committee to revise and simplify the Education Law, the Legislature amended and recodified the then existing law by enacting chapter 987 of the Laws of 1971. Sections 6554 and 6506 of the Education Law are the pertinent sections here. It is important to note that there is no claim here that the amendments in any way diminished or impaired the "grandfather" provisions or any other rights acquired by the petitioner under the original act. Since 1963, the petitioner has continued

her practice and has taken the examination for admittance as required by section 6554 of the Education Law on seven different occasions and has failed to achieve the necessary grade on each opportunity. She does not question the make-up of the examination, nor does she take issue with the grading thereof. Petitioner does contend that her final grade, as computed under 8 NYCRR 73.3, is such that when coupled with her experience, constitutes substantial compliance and that, therefore, the board abused its discretion by not waiving the examination result as she asserts they could and should do under subdivision (5) of section 6506 of the Education Law. As an alternative to receiving a passing grade of 75 in each subject in order to pass the examination, the regulations (8 NYCRR, 73.3) provide in substance that any candidate who passes all required subjects but one, may average the highest grades attained in each subject (passed) with the highest grade obtained in the failed subject and if the average is 75 or more, the candidate shall be deemed to have passed the examination. Using this procedure, petitioner's grade is 74.4. Subdivision (5) of section 6506 of the Education Law provides as follows: "In supervising, the board of regents may: * * * (5) Waive education, experience and examination requirements for a professional license prescribed in this article relating to the profession, provided the board of regents shall be satisfied that the requirements of such

article have been substantially met". It should be remembered that in an article 78 proceeding the court may not substitute its own judgment for that of the board and may inquire only as to whether the record shows facts which leave no possible scope for the reasonable exercise of discretion (Matter of Mid-Is. Hosp. v. Wyman, 25 AD 2d 765, 767). There must be a clear showing that petitioner has established a distinct right to the relief sought (Matter of Stracquadanio v. Department of Health, 285 N.Y. 93). Subdivision (5) of section 6506 of the Education Law is permissive, not mandatory. In its delegation of responsibility in the licensing area, the Legislature sought to provide the Regents with the means of minimizing hardship while at the same time providing overall protection for the public by establishing minimum standards of competence. A review of the applicant's record on the chiropractic examinations and the fact that she failed seven examinations in as many attempts provides ample justification for the Regents' failure to exercise the discretion granted to them and removes any doubt that their action was arbitrary or capricious. Had the board waived the requirements on the record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against the countless numbers who have taken this State's licensing examinations and barely failed. The petitioner has failed to meet her burden and the board's action was thoroughly justified. Judgment reversed, on the law and the facts, and petition

dismissed, without costs. Staley, Jr., J.P., Greenblott, Cooke, Main and Reynolds, JJ., concur.

Decision of Court of Appeals of the State of New York

In the Matter of MARY TOMANIO, Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et al., Respondents

(Argued October 21, 1975; decided November 20, 1975)

Physicians and surgeons - license to practice chiropractic - petitioner, who had been practicing chiropractic in New York since 1958, had taken licensing examination on seven different occasions subsequent to enactment of chiropractic licensing law; had passed all subjects except chemistry, and had average of 74.4 in group of subjects containing chemistry, while passing mark therein was average of 75, applied to Board of Regents for licensure pursuant to section 6506 (subd [5]) of Education Law, providing that board might waive prescribed education, experience and examination requirements if it was satisfied said requirements had been substantially met - in article 78 proceeding, contention by her that board acted arbitrarily and capriciously when it denied her application - order of Appellate Division which dismissed her petition affirmed - board's refusal to waive examination required by statute was not, as matter of law, abuse of discretion.

Matter of Tomanio v. Board of Regents of Univ. of State of N.Y., 43 AD2d 643, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 30, 1973, which (1) reversed, on the law and the facts, a judgment of the Supreme Court at Special Term (De Forest C. Pitt, J.), entered in Albany County in a proceeding pursuant to CPLR article 78, granting a petition for a judgment directing the issuance to petitioner of license to practice chiropractic in New York State, and (2) dismissed the petition. Under the Regulations of the Commissioner of Education, the passing mark for each subject of the chiropractic licensing examination was 75, except that the passing mark in all subjects of any one group of subjects was an average of 75, provided that, in determining the average, no grade less than 65 and only one grade less than 75 was accepted (8 NYCRR 73.3). Under section 6506 (subd [5]) of the Education Law, the Board of Regents might "Waive education, experience and examination requirements for a professional license prescribed in the article relating to the profession, provided [it] shall be satisfied that the requirements of such article have been substantially met". Petitioner had been practicing chiropractic in New York since 1958, had taken the licensing examination on seven different occasions subsequent to the enactment of

the chiropractic licensing law (L 1963, ch 780), had passed all subjects except chemistry, in which she received a mark of 67, and had an average of 74.4 in the group of subjects containing chemistry. She applied to the board for licensure pursuant to section 6506 (subd [5]) of the Education Law, alleging as reasons why it should exercise its statutory power, that she had failed by a narrow margin; that her failure was caused by failing a science not utilized in chiropractic, and that she had qualified for practice in two other States, had passed an examination given by the National Board of Chiropractic Examiners, and had 13 years of practice in New York. In her present proceeding she contended that the board acted arbitrarily and capriciously when it denied her application.

Vincent J. Mutari for appellant.

Donald O. Meserve and Robert D. Stone for respondents.

Order affirmed, without costs. The refusal of the Board of Regents to waive the examination required by statute was not, as a matter of law, an abuse of discretion. (Education Law, §6506, subd [5]; §6554, subd [4]; see, also, Matter of Levi v Regents of Univ. of State of N. Y., 256 App Div 444, affd 281 NY 627.)

Concur: Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg. Taking no part: Judge Cooke.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO, Plaintiff, -against- THE BOARD OF REGENTS of the University of the State of New York, and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York, Defendants.	COMPLAINT CIVIL ACTION NO. 76-CV-263

Plaintiff, by her attorney, respectfully alleges:

I. JURISDICTION

1. This is a civil action brought by the plaintiff for a preliminary injunction to stay defendants from preventing plaintiff's practice of chiropractic in the State of New York, pending a final determination of the matter herein, and for a judgment declaring defendants use of their discretionary power to waive requirements for chiropractic licenses in New York State,

violative of the due process clauses of the 14th and 5th amendments of the United States Constitution, and ordering defendants to grant a license to plaintiff for such chiropractic practice.

2. Jurisdiction is conferred upon this Court by Title 28 of the United States Code, Sections 1331, 1343, 2201 and 2202 and by Title 42, Section 1983.

3. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) dollars.

II. PLAINTIFF

4. The plaintiff in this action is a 56 year old woman who has been legally practicing chiropractic in New York State for the past 18 years, and who has qualified in every respect for licensure as a chiropractor except that she failed one part of a licensing examination by .6 of 1%. Plaintiff is a citizen of the United States.

III. DEFENDANTS

5. The defendant, BOARD OF REGENTS, is a body of persons appointed by the Governor of the State with the approval of the State Senate, among whose duties is the supervision of the admission to the practice of the profession of chiropractic in New York State.

6. The defendant, EWALD NYQUIST, is the Commissioner of Education and Chief Administrative Officer of the Education Department of New York State, among whose duties is the administration of the Education Law of the state and regulations promulgated thereto.

IV. FACTUAL ALLEGATIONS

7. The plaintiff is over 56 years old and has been practicing chiropractic for more than 18 years in New York State.

8. Prior to 1963 no license was required in New York State to practice chiropractic.

9. In 1963 a licensure statute was passed and since that time, the practice of chiropractic without a license in New York State has been a crime. However, pursuant to state law and a court ordered "stay" in a legal action concerning the licensure examination, plaintiff and other chiropractors in practice before the statute was passed, were permitted to remain in practice while taking licensing examinations.

10. On the said chiropractic licensure examinations, plaintiff passed anatomy, physiology, bacteriology, pathology, hygiene, diagnosis and the practice of chiropractic, failing only chemistry, a science chiropractors are actually forbidden by law to utilize in New York State.

11. The New York State Education Commissioner's regulations, Section 73.3 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York, direct that, if there is a failure in only one science subject, all grades in the science group (anatomy, physiology, chemistry, bacteriology, and pathology) shall be averaged, and, if the averagegrade thus determined is 75 or more, the applicant shall be deemed to have passed all subjects in that group. In the case of the plaintiff, the applicants' average grade for the science group was 74.4. Her grades in all other groups were, of course, passing.

12. New York State Education Law Section 6506, Subdivision 5, effective September 1, 1971, states "the board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may:..... (5) waive education, experience and examination requirements for a professional license prescribed in the article relating to the professions, provided the board of regents shall be satisfied that the requirements of such article have been substantially met."

13. Plaintiff therefor applied to defendant Board of Regents, setting forth all the facts and reasons which plaintiff felt warranted the exercise of their above power to issue a chiropractic license to her, including the very narrow margin of her examination failure; the fact that she

fulfilled all the other qualifications for licensure as to age, morals and education; and the fact that she had successfully practiced chiropractic for over 13 years with an unblemished record.

14. The defendants denied plaintiff's application, without a hearing or an explanation.

15. On information and belief, the defendants have never granted any application for waiver of professional licensure requirements submitted to them under Education Law 6506, Subdivision 5, since the enactment of the law in 1971 and have admitted in open court that they have not.

16. Plaintiff instituted action for review of the Regents decision denying her application in the Supreme Court, of the State of New York on the grounds that the Regents' decision was arbitrary and capricious use of their power. The State Supreme Court agreed with plaintiff and directed defendants to issue the license in question to her. However, on appeal to the Appellate Division and Court of Appeals, that decision was reversed. In these proceedings, plaintiff never raised the constitutional question.

V. OTHER ALLEGATIONS

17. This suit involves a genuine controversy between plaintiff and

defendants, necessitating declaratory relief, since, if defendants are permitted to continue the use of their discretionary powers in the manner which plaintiff believes is violative of her constitutional right to due process, she will be unable to obtain a license for the practice of her profession in New York State.

18. Since plaintiff does not now have a license to practice chiropractic in New York State, the defendants, at any time that she should attempt to practice the profession by which she has supported her family for 18 years, can prosecute her criminally. The inability to practice her profession is causing her irreparable harm and injury in loss of patients and income, which will not be restored even if, by this action, she receives a license for such practice. On the other hand, no harm can be done by permitting plaintiff to practice the profession in which she has been successfully engaged, without blemish to her record, for over 18 years. Thus, her urgent need for an order of this Court enjoining defendants from interfering with her practice during the pendency of this action, is clear.

19. Plaintiff has no plain, or adequate remedy at law other than this request for declaratory and injunctive relief.

VI. BASIS OF CLAIM

20. The New York State legislature passed the statute giving the Regents the power to waive requirements for licensure with the intent that such power be exercised on occasion, and only after establishment of procedures for fair review of the individual circumstances of each application.

21. Insofar as the Board of Regents has never exercised its power under Section 6506, Subdivision 5 and has never waived any licensure requirement, it is apparent that no such procedures for fair review have been established.

22. In the absence of such fair review procedures, plaintiff was not given and could not have been given, due process as required by the fifth and fourteenth amendments to the Constitution of the United States.

23. In fact, without a historical pattern of such fair review procedures, plaintiff could not even now be given such due process.

24. In the absence of the possibility of such due process, denial of plaintiff's right to resume her practice of chiropractic would be a denial of her constitutional rights. Therefor, the only way in which such rights can be protected is by granting her the waiver she seeks and permitting her to resume her practice, by issuing to her a license for same.

VII. PRAYER FOR RELIEF

25. Plaintiff prays that the following relief be granted:

(1) Defendants be adjudged to have violated plaintiff's constitutional right to due process under the 5th and 14th amendments to the United States Constitution, in denying her application for waiver of a requirement for chiropractic license, and directed to grant her such waiver.

(2) A preliminary injunction issue permitting plaintiff to practice her profession pending trial and final determination of the issues herein.

(3) Plaintiff be granted such other and further relief as this Court may deem proper.

s/ Vincent J. Mutari
Vincent J. Mutari
600 Old Country Rd.
Garden City, NY 11530

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO, Plaintiff, -against- THE BOARD OF REGENTS of the University of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education and Chief Administrative Officer of the State Education Department of the State of New York, Defendants.	ANSWER CIVIL ACTION NO. 76-CV-263

Defendants answering the petition herein, by their attorney, Robert D. Stone, Esq., allege:

FIRST DEFENSE

1. The Court lacks jurisdiction over the subject matter.

SECOND DEFENSE

2. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

3. The defense of res judicata is applicable. Judgment was entered on a decision of the Court of Appeals of the State of New York, unanimously affirming a unanimous decision of the Appellate Division, Third Department, and dismissing plaintiff's action for the same claim set forth in the complaint in this action (Matter of Tomanio vs. Board of Regents, 43 AD 2d 643, aff'd 38 NY 2d 724).

FOURTH DEFENSE

4. The determination of defendants sought to be reviewed in this action was final and conclusive November 19, 1971, and this action is barred by the Statute of Limitations, Civil Practice Law and Rules section 217.

FIFTH DEFENSE

5. The determination sought to be reviewed in this action was final and conclusive, November 19, 1971 and plaintiff has been guilty of laches in not commencing this action until June 25, 1976.

SIXTH DEFENSE

6. Admit each and every allegation contained in paragraphs numbered 1, 6, 8, 12, 13 and 16 thereof.

7. Deny each and every allegation contained in paragraphs numbered 2, 3, 14, 15, 17, 19, 22, 23 and 24 thereof.

8. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph numbered 7 thereof.

9. Answering paragraph numbered 4 thereof, defendants deny that plaintiff has been practicing chiropractic legally for the past 18 years, and admit the other allegations therein.

10. Answering paragraph numbered 5 thereof, defendants allege that members of the Board of Regents are elected by the Legislature, and admit the other allegations therein.

11. Answering paragraph numbered 9 thereof, defendants admit each allegation but further allege that the "stay" referred to expired prior to 1971, and that plaintiff was given written notice that she could not legally practice without a license on September 7, 1971.

12. Answering paragraphs numbered 10 and 11 thereof, defendants admit that the chiropractic licensing examination which plaintiff took included an examination in the basic subjects set forth therein, and allege that by combining her best marks on six special examinations given for "grandfather" applicants plaintiff eventually passed all subjects except chemistry, and that by averaging her marks as provided in the Regulations of the Commissioner of Education plaintiff

obtained an average grade in the basic science subjects of 74.4, but that 75.0 was passing, and plaintiff failed to meet the examination requirement.

13. Answering paragraph numbered 14 thereof, plaintiff alleges that no hearing was required on plaintiff's request for licensure notwithstanding her failure to pass the examination and deny that no explanation was given to plaintiff.

14. Answering paragraphs numbered 15, 20 and 21 thereof, plaintiff admits that the provisions of present section 6506 subdivision 5 of the Education Law continued the authority of the Board of Regents, formerly contained in Education Law section 211, to waive specific licensing requirements in appropriate eases, but deny that such authority was intended to or does require them to waive a failure on a professional licensing examination, and alleges that it has not been used for that purpose, and deny the other allegations therein.

15. Answering paragraph numbered 18 thereof, defendants allege that to permit the plaintiff to practice chiropractic without a licensing (sic) notwithstanding her failure to pass the licensing examination would be contrary to the public interest and would do substantial harm and admit the other allegations contained therein.

16. Plaintiff has no constitutional right to practice chiropractic without a license or to a waiver of her failing marks on the licensing examinations.

17. The Court of Appeals and Appellate Division of the State of New York have judicially construed the provisions of section 6506 subdivision 5 of the Education Law and have rejected plaintiff's claim that such provisions entitled her to a waiver of her failure to pass the examination. Such construction should be followed by this Court.

WHEREFORE, defendants demand:

(1) That the complaint be dismissed;

(2) Such other and further relief as to the Court may seem just and proper.

s/Donald O. Meserve
Donald O. Meserve, Esq.,
of Counsel
Attorney for Defendants
State Education
Department
Albany, New York 12234
(518) 474-8869

Dated: July 16, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO, Plaintiff, -against- THE BOARD OF REGENTS of the University of the State of New York, and EWALD NYQUIST, etc., Defendants.	INTERROGATORIES CIVIL ACTION NO. 76-CV-263

TO: ROBERT D. STONE, ESQ.
Attorney for Defendants
N.Y. State Education Dept.
Education Building
Albany, New York 12224

The plaintiff requests that the defendants, by the secretary of the BOARD OF REGENTS, or by any other agent or servent of the defendants familiar with its decisions under former Section 211, Subdivision 3 of the New York State Education Law, and current Section 6506, Subdivision 5 of the same law which replaced it, including the decision of the defendant in the matter herein, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. What is your name?

2. For whom do you work?

3. What is your position?

4. How long have you held that position?

5. How long have you worked for the defendant?

6. In what position, if other than your present?

7. On November 19, 1971, what was your position with the defendant?

8. Were you present at the November 19, 1971 meeting of the BOARD OF REGENTS of the University of the State of New York?

9. Are you familiar with the proceedings that took place at that meeting?

10. Are you familiar with the proceedings and correspondence pertaining to the plaintiff's application for licensure, preceeding the November 19, 1971 meeting of the BOARD?

11. Do you further hold yourself out to be a person who has knowledge of all the facts and circumstances surrounding and underlying the decision of the BOARD OF REGENTS?

12. To your best present knowledge if there is a hearing or trial of this matter will you be a witness on behalf of the defendant?

13. Are you fully familiar with the procedures of the BOARD OF REGENTS of the University of the State of New York?

14. Are you familiar with the New York State Education Commissioner's regulations, particularly Section 73.3 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York?

15. Are you familiar with N.Y. State Education Law, Section 6506, Subdivision 5, effective September 1971?

16. At the meeting held on November 19, 1971 was the plaintiff present?

17. Was her attorney present?

18. Was any documentation or writing pertaining to the application of the plaintiff, other than her attorney's letters of October 1, 1971 and September 21, 1971 presented?

19. If your answer is yes, what other written documentation was there at that meeting pertaining to plaintiff's

application, and please furnish plaintiff with copy of such documentation upon the return of these interrogatories.

20. Was a hearing held and witnesses questioned on November 19, 1971 with regard to plaintiff's application for licensure?

21. From your best knowledge of the records and procedures has the BOARD OF REGENTS of the University of the State of New York ever granted a license after an application for licensure in the chiropractic profession made under Section 211, Subdivision 3 of the State Education Law or current Section 6506, Subdivision 5 of the same law?

22. From your best knowledge of the records of the BOARD OF REGENTS of the University of the State of New York, has the Board ever granted a license after an application for licensure in any profession made in accordance with Section 211, Subdivision 3 of the State Education Law, or the current Section 6506, Subdivision 5 of the same Law?

23. Have the refusals of licensure been made other than in this case after a formal hearing to other chiropractic or other professionals?

24. Have the grantings, if any, of licensure under the herein involved statutes been made after a formal hearing?

25. Demand is made of the defendant for a certified copy of the November 19, 1971 meeting of the BOARD OF REGENTS of the University of the State of New York.

PLEASE TAKE NOTICE that a copy of such answers must be served upon the undersigned within fifteen (15) days after the service of these interrogatories.

s/ Vincent J. Mutari

Dated: December 20, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO,

Plaintiff,

-against-

THE BOARD OF REGENTS of the University of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education and Chief Administrative Officer of the State Education Department of the State of New York,

Defendants.

RESPONSE TO INTERROGATORIES

CIVIL ACTION NO. 76-CV-263

STATE OF NEW YORK:
: SS.:
COUNTY OF ALBANY :

PHILIP R. JOHNSTON, being duly sworn deposes and says that the following are his answers to the questions in the interrogatories on behalf of the plaintiff Mary Tomanio dated December 20, 1977:

1. Philip R. Johnston.

2. New York State Education Department.

3. Executive Secretary-State Board for Chiropractic and Executive Secretary-State Board for Social Work.

4. In the first position since October, 1968; in the latter position, December, 1965.

5. Twelve years, five months.

6. As described above.

7. Executive Secretary of the State Board for Chiropractic and Executive Secretary of the State Board for Social Work.

8. No.

9. I am familiar with the results of the proceedings of the November 19, 1971 meeting of the Board of Regents but I do not know what discussion occurred.

10. Yes.

11. Not being in the present at the meeting, I cannot be fully knowledgeable regarding the decision of the Board of Regents.

12. This would depend on whether or not I was requested to appear.

13. I am generally familiar with the procedures of the Board of Regents.

14. Yes.

15. Yes.

16. Not to my knowledge.

17. Not to my knowledge.

18. Yes, a summary prepared by staff of the Department was submitted to the Regents.

19. See attached.

20. No.

21. No (to the best of my knowledge only one other person has ever petitioned under these provisions for a license. The other petitioners have always been asking for waiver of preprofessional requirements so that they could be admitted to the examination).

22. Yes.

23. No. The authority to waive specific requirements for a professional license is not exercised in favor of candidates who are unable to pass the licensing examination in this State and who have demonstrated that ability by repeated failures on that examination. No formal hearing is held or required in the administration of this policy.

24. Not to my knowledge.

25. I have carefully reviewed the minutes of the Board of Regents on November 19, 1971. The only reference to the Regents action on petitioner's application contained therein is the statement on page 866 of the Regents Journal "voted, admission to the licensing examination in chiropractic after reapplication, as follows: Mary Tomanio, Beacon." I am also attaching herewith a copy of my report to the Committee on the Professions dated October 14, 1971 and of an October 15, 1971 letter from Vincent J. Mutari also submitted to that Committee. The entire licensing file was submitted to the Committee on the Professions. The Committee on the Professions, a staff committee within the Department submitted its recommendation on petitioner's application to the Board of Regents and a copy of that recommendation is also attached. The Board of Regents accepted the recommendation of the staff committee.

s/Philip R. Johnston

Sworn to before me
this 9th day of June, 1978.

s/Frederick W. Burgess
Notary Public

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

DATE: October 14, 1971

TO: Committee on the Professions

FROM: Philip R. Johnston

SUBJECT: Petition of Mary Tomanio, D.C. for a License to Practice Chiropractic

Required: The applicant applied for examination under Section 6556-3 which required, a. has been engaged for a period of at least two years, and not more than the seven years immediately prior to July 1, 1963, in the practice of chiropractic in this state; b. passes an examination prepared by the Department in the basic subjects of anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis; and c. in addition to such written examination passes a written examination prepared by the board in the use and effects of x-ray and a practical examination prepared by the board in chiropractic.

Obtained: The candidate sat for examinations in April, 1964, December, 1964, January, 1967, June, 1967, December, 1967, and May, 1971. These included the five regular opportunities provided by law under Section 6556, plus the

special make-up examination provided by stipulation. The highest grades obtained in each subject are as follows: Chemistry-67; Anatomy-77; Physiology-75; Bacteriology-75; Pathology-78; Diagnosis-77; Practice-76.

Pursuant to Section 73.3 of the Commissioner's Regulations the subjects of Anatomy, Physiology, Chemistry, Bacteriology, and Pathology were averaged, resulting in a grade for the five subjects of 74.4. The subject of x-ray had not been passed but is not fundamental in this classification to a limited license.

Problem: The petitioner seeks waiver of the requirement of passing the Chemistry examination pursuant to the Regents authority contained in Section 6506, Subdivision 5 and 9, with emphasis on the fact that "the requirements have been substantially met." A further argument is used that the chiropractic law forbids the use of chemistry in chiropractic practice.

Recommendation of Board Secretary: A memorandum of October 8, 1971 from Donald O. Meserve is brought to attention for the purpose of emphasizing, "I can say as a matter of law that it would be arbitrary, capricious and an abusive discretion for us to go along with it (the request)." Considerable leeway has already been provided through the regulation on averaging. The basic science subjects are considered fundamental to the understanding necessary for modern practice of chiropractic, and, therefore, the statement that use of chemistry is prohibited is erroneous. It is recommended that the candidate be required to reapply and take additional examination until she has met the stated requirements of the law.

RECOMMENDATION OF COMMITTEE SECRETARY:

Deny petition: license after successful completion of full chiropractic examination series.

TO BE COMPLETED FOR EXAMINATION:

Reapplication

Law Office

VINCENT J. MUTARI
Franklin National Bank Bldg.
600 Old Country Road-Suite 328
Garden City, New York 11530

Telephone: (516) 746-4240-1

October 15, 1971

The Board of Regents
Albany, N.Y. 12201

Att: Richard J. Sawyer, Secy.

Re: Mary Tomanio, D.C.

Dear Sirs:

I am pleased to learn from Mr. Johnston's letter of October 7, 1971, that, in response to my letters to you of September 21st and October 1st, Dr. Tomanio's application for chiropractic licensure, pursuant to Section 6506 of the Education Law, will be reviewed at your October 26th meeting.

For your further consideration in this matter, may I state that Dr. Tomanio's case can be importantly distinguished from the line of earlier situations in which medical doctors, having practiced in other states for 5 years or more, come into this state asking to be admitted without taking the required licensure examinations. Dr. Tomanio, it is true, does base her plea in part on the fact that she has been admitted in two other states, but she does not rely upon this alone. She shows further that she has taken and passed examinations which we

understand to be substantially similar to the New York examinations; namely, the examinations in New Hampshire and those given by the National Board of Chiropractic Examiners. It is our understanding in fact that the recent New York examinations were modeled to a substantial degree after those of the National Board.

In addition Dr. Tomanio submits that she has been practicing in this state for 13 years and has not attempted to avoid taking the New York examinations. In fact she has taken the full series provided for her by the "grandfather" provisions of the chiropractic licensing statute and has substantially met the requirements of that examination, having passed all subjects except chemistry which by law is never used in chiropractic practice, and having achieved an over-all average of 74.4 which is a bare 6/10ths of a percentage point below the passing grade.

All these facts taken together make Dr. Tomanio's situation unique as compared with the case law mentioned above which refers only to medical doctors practicing 5 years in another state. We sincerely feel that she fulfills the requirements of former section 211, and even more fully

conforms to the new requirements of Section 6506. We therefore earnestly urge you to exercise the discretion afforded you by that section to issue to her the license she desperately needs to continue in the practice by which she has supported her family for 13 years.

Very truly yours,

Vincent J. Mutari

vjm:ns
cc: Dr. E. E. Leuallen
P. E. Johnston

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO,

Plaintiff,

-against-

76-CV-263

THE BOARD OF REGENTS of the University of the State of New York; and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Defendants.

APPEARANCES: OF COUNSEL:

VINCENT J. MUTARI
Attorney for Plaintiff
600 Old Country Road
Garden City, New York 11530

ROBERT D. STONE DONALD O. MESERVE
Attorney for Defendants
State Education Department
Education Building
Albany, New York 12224

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Plaintiff Mary Tomanio commenced this action premised on the Fourteenth Amendment and 42 U.S.C. § 1983 on June 25, 1976, invoking the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331 and 1343. The ultimate relief that plaintiff seeks is an order directing the defendants Board of Regents of

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4899 CHIROPRACTIC
Mary Tomanio, Beacon, New York
(The Palmer College of Chiropractic, Davenport, Iowa, Doctor of Chiropractic 1957)

Petition for: License to practice chiropractic.

Recommendation: Admit to licensing examination in chiropractic after reapplication.

Since petitioner has not passed chiropractic examinations in accordance with law and Regulations, it is recommended that petition for licensure on the basis of obtained examination scores be denied and that licensure as chiropractor be approved upon successful completion of the full chiropractic examination series as required. In accordance with statute, to be admitted to the chiropractic examination series, petitioner shall make formal reapplication.

TO BE COMPLETED FOR LICENSURE AS CHIROPRACTOR
Submission of application for admission to examination and successful completion of full licensing examination.

the State of New York and Ewald B. Nyquist, then Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York, to waive examination requirements and issue her a license to practice chiropractic in the State of New York.

Presently before the Court is plaintiff's motion for a preliminary injunction permitting plaintiff to practice her chosen profession in the State of New York and enjoining the County Court of Dutchess County, New York, from proceeding with a pending criminal prosecution for the practice of chiropractic without a license until such time that this Court rules on the merits of plaintiff's complaint. Also before the Court is defendants' motion for summary judgment in their favor on the grounds of, inter alia, res judicata, failure to state a claim upon which relief can be granted, and statute of limitations.

FACTUAL BACKGROUND

Plaintiff has been practicing chiropractic in this state since 1958. In 1963, at the behest of chiropractors, New York State enacted a licensing scheme for the practice of chiropractic. See N.Y. Times, April 30, 1963, at 37, col. 1.

On seven separate occasions between 1964 and 1971 plaintiff attempted to satisfy the chiropractic licensing examination requirement pursuant to a "grandfather" provision applicable to those, like plaintiff, who were then practicing in New York State.

See Ch. 780, §1 [1963] N.Y. Laws 1282-1285 (McKinney) (former N.Y. Education Law § 6556). Although plaintiff failed to achieve the necessary grades for licensing, her failure was by a very narrow margin. See Tomanio v. Board of Regents, 43 App. Div. 2d 643 (3d Dep't 1973)(mem.), aff'd mem., 38 N.Y. 2d 724 (1975). Plaintiff failed one part of the licensing examination, chemistry by 8 points. Through use of the Education Department's regulation on averaging, 8 N.Y. C.R.R. § 73.3, plaintiff's failure in the science part of the examination, which includes chemistry, was by only .6 of 1%. Plaintiff received passing scores in all other subjects. In 1972, subsequent to her inability to pass the examinations given under the "grandfather" provision of the new statute, plaintiff took the regular licensing examination for chiropractors and again failed to attain a passing score. See N.Y. Education Law § 6554(4) (McKinney 1972).

Plaintiff is now over 58 years old and is the sole supporter of her family. She is licensed to practice chiropractic in Maine and New Hampshire and has passed an examination given by the National Board of Chiropractors. On September 21, 1971, plaintiff applied to defendant Board of Regents for waiver of the examination requirement pursuant to New York Education Law § 6506(5) (McKinney 1972). Under § 6506(5) the Board of Regents, in their discretion, can waive education, experience, and examination requirements if it is satisfied that the requirements for a professional license have been "substantially met." After such a waiver, the New York State Education Department would be authorized to issue a license.

By letter dated November 22, 1971, plaintiff was informed that the Board of Regents had voted on November 19, 1971, to deny her application for waiver of the examination requirement. Thereafter, by petition verified on December 10, 1971, and order to show cause signed January 26, 1972, plaintiff commenced an Article 78 proceeding attacking the decision of the Board of Regents as arbitrary and capricious and seeking an order directing the New York State Education Department and the Board of Regents to issue her a license to practice chiropractic in the State of New York.

Plaintiff's petition was granted at Special Term of the Supreme Court of the State of New York, but that order was reversed by the Appellate Division, Third Department. On November 20, 1975, the New York State Court of Appeals affirmed the order of the Appellate Division holding that as a matter of law the Board of Regents had not abused their discretion in denying plaintiff's application. Tomanio v. Board of Regents, 38 N.Y.2d 724 (1975), aff'g mem. 43 App. Div. 2d 643 (3d Dep't 1973)(mem.). See Generally Marburg v. Cole, 286 N.Y. 202 (1941).

Then, on June 25, 1976, plaintiff commenced the present action in this Court premised on violation of the due process clause of the Fourteenth Amendment. Thereafter, and now pending in the County Court of Dutchess County, a criminal action was initiated against plaintiff charging her with the unauthorized practice of chiropractic. See N.Y. Education Law § 6512 (McKinney Supp. 1977).

DISCUSSION

A

As previously noted, defendants move for summary judgment and dismissal of plaintiff's complaint on the ground of res judicata. This portion of defendants' motion is based on the prior Article 78 proceeding brought by plaintiff in the state courts. The Court of Appeals Second Circuit, however, has held that a prior state court proceeding will not bar a federal court in a civil rights action from considering matters that were not actually litigated and determined in the prior proceeding. See, e.g., Ornstein v. Regan, 574 F.2d 115 (2d Cir. 1978); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

The record on appeal and briefs submitted to the New York State Court of Appeals clearly establish that plaintiff did not raise a due process claim before the courts of the State of New York. Therefore, principles of res judicata do not bar plaintiff's present action under the Civil Rights Act alleging deprivation of her constitutional right to due process of law. This same reasoning should apply to plaintiff's assertion of a claim brought directly under the Fourteenth Amendment with jurisdiction predicated on 28 U.S.C. § 1331.

B

Defendants also challenge plaintiff's complaint on the ground that it fails to state a claim upon which relief can be granted. Defendants contend that no hearing is required before the Board of Regents when it is asked to waive a specific licensing requirement by an individual who, prior to the advent of licensing in the State of New York, had

previously been permitted to practice chiropractic in this state.

Due process is a flexible concept, the contours of which are shaped by the circumstances of each particular situation. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). Turning to the particular situation that is before this Court, it is evident that plaintiff has a constitutional right to practice her profession free from unreasonable governmental interference. Green v. McElroy, 360 U.S. 474, 492 (1959). While this is true, however, the imposition of a new requirement for the continued practice of that calling, in and of itself, does not offend the Constitution. Gray v. Connecticut, 159 U.S. 74 (1895); Wasmuth v. Allen, 14 N.Y. 2d 391, appeal dismissed, 379 U.S. 11 (1964)(per curiam). See also Bell v. Burson, 402 U.S. 535, 539 (1971).

In my judgment, the practice of chiropractic in this state, prior to the licensing scheme enacted in 1963, is a "property" interest and "liberty" interest that cannot be taken away by the state except in accordance with principles of due process as embodied in the Fourteenth Amendment. See, e.g. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923); Huntley v. Community School Board, 543 F.2d 979, 986 n.8 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977); Hecht v. Monaghan, 307 N.Y. 461 (1954). Furthermore, in determining whether to waive the examination requirements in plaintiff's behalf, the Board of Regents was called upon to ascertain "the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined." Hecht v. Monaghan, supra, 307 N.Y. at 469.

Under these circumstances, it is my opinion that before the Board of Regents decided to deny plaintiff's application for waiver of the examination requirement and licensure, a determination that is predominantly adjudicative, a hearing should have been held. See generally Weinberger v. Hynson, Westcott & Dunning, Inc. 412 U.S. 609, 637 (1973)(Powell, J., concurring). In my judgment, it is not significant under the facts of this case that pursuant to New York's statutory scheme the Board of Regents is given the authority to deny or grant a waiver of statutory licensing requirements rather than authority to withdraw or sustain the grant of a state license. The last action taken by the state with regard to plaintiff's ability to practice chiropractic in New York was contained in a letter from the Board of Regents dated November 22, 1971. By that letter, which denied plaintiff's application for waiver of examination requirements and licensure to practice chiropractic the Board of Regents terminated a "property" interest and "liberty" interest protected by the Fourteenth Amendment -- plaintiff's right to continue to practice her chosen profession.

It is not this Court's role to substitute its judgment for that of the Board of Regents in this matter. Yet, as the New York State Court of Appeals has stated, "it is no answer to say that in [t]his particular case due process of law would have led to the same result." Hecht v. Monaghan, supra, 307 N.Y. at 470. Although it does not appear that plaintiff requested a hearing or that a hearing is contemplated by statute, some form of hearing should have been held under

the circumstances of this case. Id. at 468. This decision, however, should not be misunderstood to require some form of hearing in every situation where an individual seeks a waiver of licensing requirements. For instance, a person who was not practicing chiropractic in New York prior to 1963 presents a totally different situation than that which is before this Court. In addition, it should be noted that there is no indication in the record that the burden to be borne by the state in providing some form of hearing to applicants such as the plaintiff would be of insurmountable magnitude. See Mathews v. Eldridge, supra, 424 U.S. at 335.

Furthermore, I believe that if, after a hearing as discussed above, a person is denied the right to continue in the practice of his or her chosen calling, then that person is entitled to a formal written statement of reasons articulated by the Board of Regents setting forth the basis for that determination. See Hornsby v. Allen, 326 F.2d 605, on rehearing, 330 F.2d 55 (per curiam) (5th Cir. 1964); Davis v. Clyne, 56 App. Div. 2d 692 (3d Dep't 1977)(mem.). See also Davis v. Clyne, 58 App. Div. 2d 947 (3d Dep't 1977) (mem.), leave to appeal denied, 44 N.Y.2d 646 (1978).

Therefore, in my judgment, this portion of defendants' motion is without merit and must be denied. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

C

Defendants' motion for summary judgment also sets forth the ground of statute of limitations. A statute of limitations reflects legislative wisdom in selecting a period within which to commence an action that balances the interests of preserving meritorious claims, discouraging frivolous claims, and preventing the prejudice and surprise attendant to the revival of stale claims. Federal law does not provide a specific statute of limitations for actions brought pursuant to 42 U.S.C. § 1983 or directly under the Fourteenth Amendment. Under such circumstances the applicable period of limitations will usually be taken from the most analogous statute of limitations provided for by state law. E.g., Johnson v. Railway Express Agency, Inc. 421 U.S. 454 (1975); Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963).

It has long been held that New York's three-year time period for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute," N.Y. C.P.L.R. § 214(2) (McKinney Supp. 1977), governs civil rights actions brought pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343. E.G., Meyer v. Frank, 550 F.2d 726 (2d Cir.), cert. denied, 434 U.S. 830 (1977); Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974); Romer v. Leary, 425 F.2d 186 (2d Cir. 1970).

Assuming arguendo that plaintiff has stated a claim directly under the Fourteenth Amendment with jurisdiction grounded in 28 U.S.C. § 1331, see Turpin v. Mailet, Slip Op. 3243 (2d Cir. June 5, 1978) (en banc), I would apply the same statute of limitations that governs

plaintiff's claim brought under the Civil Rights Act. See id. at 3271; Cestaro v. Mackell, 429 F. Supp. 465 (E.D.N.Y. 1977).

Furthermore, the Court of Appeals, Second Circuit, has applied the same statute of limitations to equitable as well as legal remedies sought under the Civil Rights Act. Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977). But see Ornstein v. Regan, supra, 574 F.2d at 119.

In my judgment, New York's three-year statute of limitations found in N.Y. C.P.L.R. § 214(2) governs plaintiff's claim asserted in this lawsuit. As is evident from the pleadings, plaintiff's claim arose in November 1971 when her application for waiver of the examination requirement and licensure was denied by the Board of Regents. See Ornstein v. Regan, supra, 574 F.2d at 119. Although it may appear that plaintiff's claim is time-barred, this does not end a court's inquiry into the timeliness of a claim.

Notwithstanding the passage of time since the conduct that plaintiff complains of, her action may still be timely and her claim saved if circumstances exist that would have tolled the running of the statute of limitations. In Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970), the Court of Appeals, Fifth Circuit, posited that the statute of limitations applicable to a civil rights action is tolled during the pendency of administrative and judicial proceedings aimed at vindicating a plaintiff's state-created rights. As of yet, however, the Court of Appeals, Second Circuit, has failed to address itself to this issue.

E.g., Williams v. Walsh, supra, 558 F.2d at 673 n.5; Meyer v. Frank, supra, 550 F.2d at 729 n.8. But see Ornstein v. Regan, supra, 574 F.2d at 119.

In my judgment, the present overburdening of the federal courts and the increased filings of civil rights complaints are factors that mitigate in favor of encouraging the utilization of effective and feasible administrative and judicial remedies, which exist under state law, in certain situation. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 521 (1977) (Burger, C.J., dissenting); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).

Although a toll of the statute of limitations in civil rights actions should not be routinely recognized, see, e.g., Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 454; Prophet v. Armco Steel, Inc., 575 F.2d 579 (5th Cir. 1978)(per curiam); Meyer v. Frank, supra, 550 F.2d at 726, I believe that under the facts of this case a toll is justified and would be in accordance with federal policy considerations under the Civil Rights Act.

Plaintiff's Article 78 proceeding was brought in state court almost immediately after the decision by the Board of Regents to deny her application. That proceeding was premised entirely on state-created rights and in pursuit of state-created remedies. It was not until November 20, 1975, that plaintiff's petition was dismissed by the New York State Court of Appeals. Thereafter, on June 25, 1976, plaintiff commenced the present action for vindication of her federally secured rights.

In my judgment, it cannot be said that plaintiff has slept on her rights. See Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 466.

Therefore, this Court holds, under the reasoning expounded in Mizell v. North Broward Hospital District, supra, that plaintiff's claim of deprivation of federally protected rights is not time-barred; the period of limitation having been tolled during the pendency of plaintiff's Article 78 proceeding in the state courts. Thus, this portion of defendants' motion for summary judgment must be denied.

D

Having canvassed all of the pleadings in this lawsuit, it is my opinion that defendants have not raised a viable defense to this action. See Answer, filed July 23, 1976; Roth v. Board of Regents, 310 F. Supp. 972, 974-75 (W.D. Wis. 1970), aff'd, 446 F. 2d 806 (7th Cir. 1971), rev'd on other grounds, 408 U.S. 564 (1972). Furthermore, inasmuch as there is no genuine dispute as to any material fact between the parties and because a motion for summary judgment searches the record, it is clear to my mind that plaintiff is entitled to judgment on her claim brought pursuant to the Civil Rights Act as a matter of law for the reasons set forth in Part B above. See 6 J. Moore, Federal Practice ¶ 56.12 (2d ed. 1977); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2720 (1973).

Therefore, due to the fact that the Court has reached a final determination of plaintiff's claim on the merits, plaintiff's motion for a preliminary injunction is now moot. The only issue remaining is that of appropriate relief.

By her complaint, plaintiff seeks declaratory and injunctive relief as well as such other relief as this Court may deem proper. More specifically, plaintiff seeks a declaration, under the Federal Declaratory Judgments Act, U.S.C. §§ 2201-2202, that plaintiff's constitutional right to due process was violated by the Board of Regents' denial of her application for waiver of the examination requirement; an order directing the Board of Regents to grant her application for waiver of the examination requirement; and a preliminary injunction permitting plaintiff to practice her chosen profession pending trial and final judgment on the merits of her claim.

Plaintiff's request for a preliminary injunction is now moot. In addition, I believe it would be improper for me in fashioning relief to order the Board of Regents to grant plaintiff's application for a waiver of the examination requirement or to order the New York State Education Department to issue her a chiropractic license. See Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867). Such relief could not be justified and would not be a proper remedy for vindication of the constitutional rights violated under the circumstances presented herein. See, e.g. Hornsby v. Allen, supra, 330 F.2d at 56.

Therefore, under the circumstances presented, the only relief that plaintiff seeks and to which she is entitled is a declaration that her constitutional right to due process of law under the Fourteenth Amendment was violated by the absence of some form of hearing prior to the Board of Regents' denial of her application for waiver of the examination requirement.

CONCLUSION

Accordingly, it is hereby declared and adjudged that under the due process clause of the Fourteenth Amendment plaintiff's federally secured rights were violated by defendant Board of Regents' decision not to waive the chiropractic examination requirement in plaintiff's behalf, which determination was made without affording the plaintiff some form of hearing and which was made without a formal written statement of reasons indicating why she was not granted such a waiver. All other relief requested by the plaintiff is hereby denied.

Consequently, defendants' motion for summary judgment is denied in its entirety and plaintiff's motion for a preliminary injunction is denied and dismissed as moot in light of the rulings of the Court herein.

The Clerk is hereby directed to enter a final and declarative judgment in favor of plaintiff Mary Tomanio on her claim brought under the Civil Rights Act in accordance with this memorandum-decision.

It is so Ordered.

Dated: August 25, 1978
Albany, New York

s/James T. Foley
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 798—August Term, 1978.

(Argued March 20, 1979 Decided June 19, 1979.)

Docket No. 78-7637

MARY TOMANIO,

Plaintiff-Appellee,

—against—

THE BOARD OF REGENTS of the University of the State of New York; and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Defendants-Appellants.

Before:

OAKES and LUMBARD, *Circuit Judges,* and
BRIEANT, *District Judge.**

Appeal from summary judgment granted by Chief Judge Foley of the United States District Court for the Northern District of New York declaring that appellee's

* Honorable Charles L. Brieant, United States District Court for the Southern District of New York, sitting by designation.

civil rights were violated by failure to grant a hearing prior to denying a waiver, under New York Education Law § 6506(5), of examination requirements for a license to continue the practice of chiropractic.

Affirmed.

DONALD O. MESERVE, Esq., Albany, New York (Jean M. Coon, Assistant Attorney General, State of New York, of counsel) *for Defendants-Appellants.*

VINCENT J. MUTARI, Esq., Garden City, New York, *for Plaintiff-Appellee.*

BRIEANT, *District Judge:*

Appellants (hereinafter "the Board of Regents" or "the Regents") seek to review a final judgment of the United States District Court for the Northern District of New York, James T. Foley, Chief Judge, which declared the Regents had violated plaintiff-appellee's civil rights. The Regents urge that the district court erred in holding that under the circumstances detailed below, appellee was entitled to an impartial hearing and statement of reasons for denial of her application for a waiver of state professional licensing requirements, as authorized by New York Education Law, § 6506(5). The Regents also claim the action should have been dismissed as *res judicata* by reason of a state court judgment, and that it was time barred. Finding no merit in any of these contentions, we affirm.

Effective July 1, 1963, the profession of chiropractic came under licensure by the Regents as a result of Chap-

ter 780, *et seq.* of the New York Laws of 1963, now codified as amended in §§ 6552, *et seq.* of Title 8 of the New York Education Law. Current practitioners of chiropractic on that date were permitted to qualify under the less stringent provisions of former § 6556 of the New York Education Law. This "grandfather" provision, as it was characterized below, required passing an examination in the practice of chiropractic, and if the applicant wished to use X-ray, a further examination in its use and effect. As to current practitioners, § 6506(5) authorized waiver of "education, experience and examination requirements for a professional license . . . provided the Board of Regents shall be satisfied that the requirements of such Article have been substantially met."

Plaintiff-appellee took the special examinations intended for current practitioners and passed all subjects except chemistry and X-ray. Chemistry was mandatory, although, as noted above, a limited license excluding use of X-ray can be obtained without a passing mark in that field. Computing her test scores in the manner permitted by the New York State Education Department's regulation on grade averaging [8 N.Y.C.R.R. § 73.3] appellee's failure in the science part of the examination which includes chemistry was measured by a margin of six tenths of one percent. She received passing scores in all other subjects.

Appellee, 58 years old at the time of her hearing in the district court, was licensed to practice her profession in Maine and New Hampshire, and has also passed an examination given by the National Board of Chiropractors. On September 21, 1971, she applied for a waiver under § 6506(5) quoted above. This application was denied November 19, 1971 without a hearing, and without any statement of reasons.

As to whether the federal claim is time barred, we conclude the district court did not abuse its discretion in determining that the statute of limitations was tolled for a period commencing January 26, 1972, when appellee filed a timely proceeding in the New York State Supreme Court pursuant to Article 78 of the New York CPLR to set aside the denial of waiver by the Regents as arbitrary and capricious and order issuance of a license to practice chiropractic. That petition, which pleaded no federal constitutional claims, was granted at Special Term of the New York Supreme Court, but the order was later reversed on appeal. It was not until November 20, 1975 that the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court holding that as a matter of state law the Board of Regents had not abused its discretion in denying the waiver. *Tomanio v. Board of Regents,* 38 N.Y.2d 724 (1975), *aff'g. mem.* 43 App.Div.2d 643 (3rd Dept. 1973). Appellee was diligent in pressing her claims. Her state litigation was initially successful. It was not until after the three year statute of limitations had expired that the state litigation was finally resolved against appellee. She filed this action on June 25, 1976, some seven months later. This Court has recognized the propriety, under such circumstances, of tolling the statute in the interests of advancing the goals of federalism. *Williams v. Walsh,* 558 F.2d 667, 674 (2d Cir. 1977); *Ornstein v. Regan,* 574 F.2d 115, 119 (2d Cir. 1978).

As the federal constitutional claim was not raised or litigated in the state proceeding, it was not barred in the federal court by the doctrine of *res judicata.*[1] *Ornstein v.*

1 Nor are we, as the dissent suggests, second guessing twelve New York appellate judges, which, were it so, would indeed be "offensive to accepted principles of federal-state comity, common

Regan, supra at 117; *Winters v. Lavine,* 574 F.2d 46 at 56-58 (2d Cir. 1978) and cases therein cited.

By its plain meaning, the waiver provision of New York State Education Law § 6506(5) is applicable to appellee's factual situation. That this is true was implicitly conceded in the opinions in appellee's state court proceedings cited above. This being so, before such a waiver could be denied to one already practicing her profession, appellee was and is, under the circumstances of this case, entitled to an adjudicative hearing before the Board of Regents, or its duly designated impartial hearing officer, and if waiver be denied, is also entitled to a statement of reasons for the denial.

Doubtless procedural due process requirements would be satisfied were licensure made dependent solely on passing a fairly written examination reasonably related to the required skills, with those who flunk cast out of their profession. In this case, those who flunk may be admitted nonetheless by waiver, the granting or withholding of which is entrusted to the Regents on statutory criteria as broad and vague as that found in *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963). Where, as here, such broad discretionary power is granted to admit or deny entrance or continuance in a learned profession, it "must be construed to mean the exercise of a discretion to be exercised after fair investigation with such notice, hearing and opportunity to answer for the applicant as would constitute due process." *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 123 (per Ch. Justice Taft, 1926).

sense and judicial modesty." The rule of this Court, stated in *Lombard v. Board of Education,* 502 F.2d 631, 635 (2d Cir. 1974) allows a civil rights plaintiff to split his cause of action, litigate state claims in the state court, lose, and then start all over again in federal court, asserting his constitutional or federal civil rights claims arising out of the same facts. Because, as in *Lombard,* appellee did not raise her federal constitutional rights in the state courts, none of the twelve New York judges passed on them.

The adjudicative fact to be determined in considering whether to grant a waiver is not whether Dr. Tomanio may practice her profession in New York, as she can do in Maine and New Hampshire, as a matter of grace from her sovereign or at the whim of the Regents. Rather, it is whether, notwithstanding her narrow failure of the examination, she "substantially" meets licensure requirements. Of course the state legislature need not have provided for any waiver of the examination. But once it did so, denial of the waiver implicates procedural due process rights. An adjudicative fact of such significance to appellee's interests cannot, in logic or constitutionally, be resolved without a hearing before an impartial fact finder, followed by a statement of reasons in the event of denial. This is so because the interest of a current practitioner of the healing arts in the continued practice of her profession is a property right within Fourteenth Amendment protection as defined in *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972), and may also be "liberty" within the same provision. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). See also, *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78 (1978) and Friendly, "Some Kind of Hearing" 123 U.Pa.L.Rev. 1267, 1296-97 (1975). The judgment appealed from merely declares such right. Whether, following an impartial hearing, appellee would be entitled to a waiver was not determined below, nor could it be in the absence of such hearing.[2]

2 The dissent notes that "plaintiff does not suggest any reason why the Board would or should grant a waiver." A logical argument can be made that since Dr. Tomanio is licensed in two other states, has practiced successfully for so many years, and passed her National Boards, she might be able to convince an impartial hearing officer that she "substantially" meets the requirements of the statute, notwithstanding her failure of the examination by six-tenths of one percent. We express no opinion on the point except that Dr. Tomanio's right to due process would seem, under these facts, independent of her likelihood of success at a hearing.

LUMBARD, *Circuit Judge* (dissenting):

I would reverse the judgment of the district court and dismiss the complaint.

Plaintiff brought this action in the United States District Court for the Northern District of New York, contending that defendants' refusal to issue a license to practice chiropractic in the State of New York deprived her of property without due process in violation of the Fourteenth Amendment. She requested an injunction directing that she be permitted to practice chiropractic in New York. Defendant answered and moved for summary judgment dismissing the complaint.

The district court awarded judgment for the plaintiff, declaring that defendant's failure to provide a hearing on plaintiff's application for a waiver of the examination requirement deprived her of her livelihood without due process. The court did not grant any affirmative relief, but issued a declaratory judgment stating that the plaintiff's due process rights had been violated and that she was entitled to an administrative hearing. Defendants appealed.

New York's chiropractic licensing statute was enacted as Chapter 781 of the Laws of 1963, to take effect July 1, 1963. Plaintiff had been practicing chiropractic since 1958. The statute provides general licensing requirements for new applicants, including, inter alia, examination requirements. The statute also includes a generous "grandfather" provision, allowing an alternative method of qualifying for persons already practicing chiropractic on the effective date of the statute. Plaintiff has taken the examinations under the less rigorous provisions of the grandfather clause on six occasions, the last time in 1971, but has never achieved a total accumlated score sufficient to pass even under this lesser standard. Plaintiff has also

aken and failed the regular licensing examination. She nevertheless remains eligible to take and pass the regular licensing examination.

After failing to pass the required examination on her seventh attempt, plaintiff applied for a waiver of the examination requirement under a general provision of the Education Law, applicable to all professions, allowing the Board of Regents, in its discretion, to waive specific requirements for licensing "provided the Board of Regents shall be satisfied that the requirements . . . have been substantially met." Education Law Section 6506, subdivision 5. This statute makes no provision for a hearing on an application for a waiver. The Board of Regents, after considering plaintiff's request for a waiver, denied her application.

Plaintiff then brought a proceeding in the state courts pursuant to Article 78 of the New York Civil Practice Law and Rules, seeking to compel the Board of Regents to waive the examination requirement in her case and to issue her a license. Supreme Court, Albany County, entered judgment for plaintiff, without opinion. The Appellate Division, Third Department, reversed in a unanimous opinion, on the ground that the authority to give a waiver is "permissive, not mandatory":

> "A review of the applicant's record on the chiropractic examinations and the fact that she failed seven examinations in as many attempts provides ample justification for the Regents' failure to exercise the discretion granted to them and removes any doubt that their action was arbitrary or capricious . . . had the board waived the requirements on record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against countless numbers who

> have taken this State's licensing examinations and barely failed." 43 App. Div. 2d 643 (1973).

The Court of Appeals affirmed the Appellate Division in a second unanimous opinion, on the ground that "the refusal of the Board of Regents to waive the examination required by statute was not, as a matter of law, an abuse of discretion." 38 N.Y. 2d 724 (1975). Plaintiff then brought suit in federal court and obtained the declaratory judgment on appeal here.

The Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property, without due process of law." Courts have construed this clause to mean that when the state takes a person's property, it must adhere to recognized principles of substantive and procedural law. Thus when any significant property interest, such as a person's entitlement to earn a living as a chiropractor, is taken, that person is entitled to a hearing and a right to be heard. The type of hearing that is required in a particular situation depends on all the circumstances. I would hold with the New York Court of Appeals that in the context of professional licensing, a regularly and fairly administered examination procedure satisfies plaintiff's due process right to be heard. Here the plaintiff does not challenge the fairness of the examination itself, the way in which it was given, or the way in which it was graded.

I do not believe that due process requires, in addition to a fair examination, a special hearing to determine whether the examination should be waived for applicants who have failed it. Where a law or regulation, such as the regulation setting up minimum passing grades here, has been validly promulgated for a legitimate public purpose and the complainant admittedly falls within the am-

bit of that regulation, enforcement without exceptions does not violate due process.

Even after taking account of the importance of plaintiff's property interest, the public interest in an objective and impartial method for certifying chiropractors fully justifies exclusive reliance on an examination procedure such as New York provides. Although we may sympathize with the plight of those who fail qualifying professional examinations, those examinations are required for a reasonable and valid public purpose: to determine who is qualified to practice a particular profession. In this case, the qualifying examination which the appellant has repeatedly failed is the principal means for protecting a public which cannot by itself adequately verify the credentials of those chiropractors they turn to in time of need.

That the State of New York has gone beyond the requirements of due process, as fulfilled by a fair examination, and has provided for the possibility of a waiver in the discretion of the Board of Regents, should not change the result. The addition of a waiver procedure which is not required by due process does not require a further hearing where a further hearing would not otherwise be required. Plaintiff, moreover, has not shown any unfairness either in the processing of the examination or in the decision to deny her a waiver. Plaintiff does not suggest any reason why the Board would or should grant a waiver. In short, she has not been deprived of any right by reason of not being allowed to appear before the Board.

Plaintiff might have made out a case on her right to receive a waiver, or at least on her right to a hearing before one was denied, had she shown that the state had granted waivers to others who had failed the examination

and that there were no discerible standards for distinguishing her from those who had received the waivers. But plaintiff has made no such showing. In fact, she has not shown us one case where anyone who has failed the examination has been given a waiver relieving them of the consequences. Indeed, although the waiver provision theoretically includes waivers for failure to pass the examination, it is more clearly aimed at waiver of requirements less directly related to competency, such as residence or citizenship. Accordingly, that the letter of the law was applied to appellee as the legislature contemplated does not make out arbitrary and capricous action amounting to a violation of due process.

Finally, in the absence of a violation of due process (such as does not exist here), I do not think that the federal courts should interfere with state licensing procedures—especially to require the state to hold a hearing in a case where no good reason is shown for holding one.

If we were to affirm the district court's notion that the plaintiff is entitled to a hearing, we would be suggesting resort to the federal courts whenever a state agency fails to license someone who fails to qualify. We would not only interfere with what is exclusively a state function, we would also encourage frivolous and needless litigation.

If New York opts for strict observance of its licensing laws it is not the proper business of the federal courts to decide how, if at all, strict observance should be tempered by a waiver procedure, so long as the administration of the state system does not offend equal protection. For one, two or even three federal judges to second-guess twelve New York appellate judges on a question of this nature is offensive to accepted principles of federal-state comity as well as to common sense and judicial modesty.

TOMANIO, MARY E. RECORD OF CHIROPRACTIC EXAMINATIONS

A. EXAMINATIONS UNDER FORMER EDUCATION LAW SECTION 6556.

DATE	BACT.	HYG.	CHEM.	DIAG.	PATH.	ANAT.	PHY.	PRACT.	X-RAY
4/64	(28)	(58)	(36)	(61)	(40)	(46)	(57)	(62)	(48)
12/64	(36)	(59)	(48)	(63)	(52)	(49)	(54)	(54)	(49)
66-67	(35)	(56)	(30)	(56)	(57)	(34)	(34)	(60)	(43)
6/67	(43)	(63)	(41)	77	(70)	(59)	(49)	(52)	(43)
12/67	(49)	(63)	(52)		(65)	(56)	(59)	76	(63)
5/71	75		(67)		78	77	75		(64)

B. EXAMINATION UNDER EDUCATION LAW SECTION 6554.

DATE	MICRO.	ANAL.	CHEM.	DIAG.	PATH.	ANAT.	PHY.	PRACT.	X-RAY
1/72	(62)	(52)	(41)	75	75	(71)	75	75	(55)